

Before the
Federal Communications Commission
Washington, DC

In the Matter of) MM Docket No. 99-232
)
Amendment of Section 73.202(b),)
Table of Allotments,) RM-9321
FM Broadcast Stations)
(Fort Bridger, WY and Hyrum, UT))

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To: Chief, Allocations Branch

FEDERAL COMMUNICATIONS COMMISSION
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REPLY TO OPPOSITION TO MOTION TO STRIKE

KGNT Inc., by its attorney, hereby submits its Reply to the "Opposition to Motion to Strike" filed on behalf of M. Kent Frandsen in this proceeding. With respect thereto, the following is stated:

Frandsen seeks the reallocation of Channel 256C3 from Fort Bridger, Wyoming to Hyrum, Utah. As KGNT established in his pleading, Frandsen (1) first sought to avoid the Commission's procedural rules by filing his required *Tuck* and "gain/loss" studies after the date established by the Commission for filing Comments, thereby rendering impossible the ability of any opponent to properly file responsive comments within the pleading cycles established by the Commission; (2) filed a responsive pleading styled as a "Response to Reply Comments" without serving the other party to this proceeding. Frandsen does not deny either action. Instead, he argues that his showing was timely, and further, persists in his argument that his Petition for Rule Making can be granted.

Frandsen is wrong in both respects, and his Opposition is easily disposed of. First, Frandsen argues his studies, showings, and expression of interest were "timely filed" because

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“they were filed within the designated filing periods.” Opposition at 2. Frandsen is wrong. Beside the fact the Commission’s procedures provide that “replies” shall be limited to matters raised in oppositions (e.g., 47 C.F.R. § 1.45), the Appendix to this Rule Making proceeding clearly advised Frandsen as follows:

Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. **Proponent(s) will be expected to answer whatever questions are presented in initial comments.** ... Failure to file may lead to denial of the request.

DA 99-1233, Appendix at ¶ 2. Frandsen clearly did not obey that directive. Therefore, in contrast to his claim to the contrary (*Opposition to Motion to Strike* at 2), his engineering showings were indeed “late-filed..”

Frandsen also claims that even if his showing and study was “late-filed,” they nevertheless should be accepted, claiming that the Commission accepts late filed comments when there are “no conflicting or ‘counter’ proposals...filed against the proposed allocation....” *Opposition to Motion to Strike* at 3. Frandsen misstates Commission policy. As even Frandsen’s own cases¹ demonstrate, “acceptance is limited to situations where **there is no opposition to the channel proposals** and where there would be no adverse impact on another pending proposal.” *Santa Isabel, Puerto Rico and Christiansted*, VI, 3 FCC Rcd 2336 (1988) (emphasis added). *See also*, *Moscow, OH, et al.*, 5 FCC Rcd 927 ¶ 10 (1990) (“[a]cceptance of late-filed comments supporting an allotment proposal is limited to situations where there is no opposition to the proposal and where there would be no adverse impact on another pending proposal”). In the only other case cited by Frandsen in support of his proposition (*Premont, TX*, 1997 FCC LEXIS

¹ *Opposition to Motion to Strike* at n.7.

1323 (March 14, 1997)), the Commission obeyed that directive -- it accepted late-filed comments because “no other comments were received.” *Id.* at ¶ 1. In short, in no case cited by Frandsen has the Commission limited its policy regarding late-filed comments to situations involving “counter-proposals or conflicting proposals” as Frandsen claims. *See, e.g., Opposition to Petition to Deny* at 3 and n.6. Rather, late-filed comments are unacceptable whenever there is an “opposition” to the proposal. And, as Frandsen implicitly concedes (*Opposition to Motion to Strike* at 6), KGNT clearly has filed an “opposition” to the proposal. As such, his late-filed comments are unacceptable.

With respect to Frandsen’s claim that since KNYN is not on the air, no assessment is necessary to determine whether the proposed re-allotment would result in a “preferential arrangement of allotments” (*Opposition to Motion to Strike* at 4-5), Frandsen is confusing the results of *gain/loss* analyses (which concern withdrawal of service, and which, strictly speaking are indeed irrelevant when dealing with a station that is off the air²), and the *Tuck*³ analysis often required by the Commission (which examines whether the proposed reallocation community is truly independent of the dominant community within an Urbanized Area), with the analysis required under the Commission’s other allotment rules. While Commission policy permits the reallocation of channels to new communities, it allows such reallocation to occur only where the new allotment will result in a “preferential arrangement of allotments.” *Modification of FM and TV Allotments to Specify a New Community of License*, 4 FCC Rcd 4870, 4872 ¶ 2 (1989).

² *See, e.g., East Brewton, AL and Navarre, FL*, 12 FCC Rcd 19469, ¶ 6 (Chief, Allocations Branch 1998); *Shelby and Dutton, MT*, 1999 FCC LEXIS 2959, ¶ 3 (June 25, 1999); *Pecos and Wind, TX*, 1999 FCC LEXIS 609 (Chief, Allocations Branch 1999).

³ *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

In all relevant respects, the analysis warranted in this case is identical to that performed in *Pecos and Wink, Texas*, 14 FCC Rcd 2840 (Chief, Allocations Branch 1999). That case also involved an unbuilt construction permit, and since the station was unbuilt, a “gain/loss” analysis was deemed unnecessary, and in light of the proposed community’s location outside of an urbanized area, a *Tuck* analysis was also deemed unnecessary. *Id* at 2841 ¶ 4. Nevertheless, despite its status, as here, *i.e.*, as an unbuilt station that was proposed to be assigned to a community as a “first local service,” the Commission then engaged in a study “to determine whether the reallocation will result in a preferential arrangement of allotments.” *Id* at 2841 ¶ 5.

That analysis revealed that retention of the allotment to its previous community would allow service to be provided to white and gray areas, and consequently, while the reallocation would entitle the proponent’s proposal to Priority 3 status (first local service), retention of the allotment to its existing community placed the existing allotment in Priority 1 (first full-time aural service). The proposed reallocation was denied. The Commission concluded that “[b]ased upon our allotment priorities, retention of the channel [at its original community] is superior to the proposed allotment to [the new community] because the existing arrangement of allotments would provide first full-time service [to the original community] over a first local service [at the new community].”⁴ *Id.* at 2842 ¶ 5.

⁴ *Accord, Midway, Panacea and Quincy, FL*, 10 FCC Rcd 6112, 6113 ¶ 6 (Chief, Allocations Branch 1995) (analysis performed despite the fact that allotment “has never been on the air”); *East Brewton, AL and Navarre, FL*, 12 FCC Rcd 19469, 19472 ¶ 6 (Chief, Allocations Branch 1997) (reallocation allowed only having concluding that “petitioner’s proposal would result in a preferential arrangement of allotments” if reallocation were allowed to occur).

For the exact same reasons, based upon the results of Frandsen's own engineering study⁵, the proposed reallocation in this case must be denied, as well.

Conclusion

In short, Frandsen's showing is replete with procedural and substantive deficiencies preventing its grant. As such, it must be denied.

WHEREFORE, it is respectfully requested that this Motion to Strike be granted, and that the information and arguments presented herein be fully considered by the Commission.

Respectfully submitted,

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⁵ As noted previously, although Frandsen correctly noted that the proposed reallocation would provide Hyrum with its "first local transmission service" (Reply Comments at 2), which is Priority "(3)," as Frandsen's own engineering shows, the allotment, as it *currently* exists, at Fort Bridger will provide service to a "white area," which is allotment Priority "(1)" under the Commission's allotment criteria. The "white area" consists of 3,267 persons (Frandsen *Reply Comments* at Exhibit B), which is even greater than the white area population that was found to exist in the *Pecos and Wink, TX* case (which consisted of 673 persons). Thus, grant of the L.Topaz/Frandsen's proposal would *not* result in a "preferential arrangement of allotments," and must be denied for that reason.

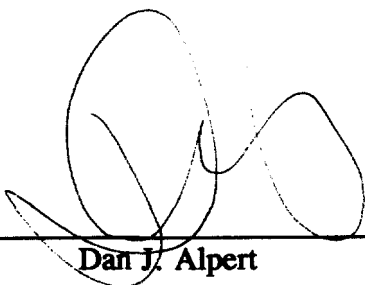
CERTIFICATE OF SERVICE

I, Dan J. Alpert, hereby certify that on November 16, 1999 the foregoing document is being served by First Class Mail, postage prepaid, to the following persons:

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